Supreme Court, U.S.
FILED
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(2)

No. 90-1351

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1990

JOHN JUDICE AND AUDREY JUDICE,
Petitioners,

versus

SAM PARICH, WESLEY PARICH,
AIMEE V. PARICH, AND STATE FARM
MUTUAL AUTOMOBILE INSURANCE COMPANY,
Respondents.

Petition for Writ of Certiorari To The
United States Court of Appeals For the
Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Was the Fifth Circuit Court of Appeals decision, holding a valid and effective compromise agreement was entered into between the Parichs and the Judices, thereby 'fixing' the total amount of damages suffered by the Parichs on account of State Farm's negligent failure to settle the case, and consequently defining the upper limit of State Farm's liability in the instant laysuit manifestly erroneous, such that it should be disturbed on appeal?

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RESPONDENT'S BRIEF IN OPPOSITION

This brief is respectfully submitted on behalf of State Farm Mutual Automobile Insurance Company in opposition to the Petition of John and Audrey Judice for a Writ of Certiorari to review the decision of the U. S. Court of Appeals for the Fifth Circuit in this case. (The decision of the U.S. Court of Appeals, Fifth Circuit, in this action is setforth in full at Page App. 3 of the Appendix to Petitioner's Petition).

STATEMENT OF THE CASE

The facts surrounding the instant appeal are summarized for this Honorable Court's review. On May 31, 1982, at 6:01 p.m., Wesley Parich, the then minor son of Sam and Aimee Parich, was involved in an automobile accident with John Judice in the City of New Iberia, Louisiana. State Farm Mutual Automobile Insurance Company had issued to Aimee V. Parich, a policy of liability insurance covering Sam Parich, Aimee Parich and Wesley Parich.

On March 24, 1983, a suit was filed by John Glenn Judice and Audrey Judice (hereinafter referred to as "the Judices") in the Sixteenth Judicial District Court, Parish of Iberia, State of Louisiana, Number 52363, as a result of the automobile accident of May 31, 1982, described hereinabove. Named Defendants were Wesley Parich, Aimee Parich, Sam Parich (hereinafter referred to as "the Parichs") and State Farm Mutual Automobile Insurance Company (hereinafter referred to as "State Farm"). As a result of the March 24, 1983 lawsuit, State Farm informed Ms. Aimee Parich on June 22, 1982, that the amount claimed against her in this suit was in excess of the protection afforded by the State Farm policy and that there may be a personal liability for damages on her part.

Trial of the March 24, 1983 lawsuit was held on April 16, 1986 and a verdict was handed down by the jury in favor of the Judices and against the Parichs and State Farm for a total of $372,000.00. Additionally, the jury assigned ten (10) percent fault on the part of the City of

New Iberia (a party whose claim against them was compromised by the Judices prior to suit).

After the rendition of the personal injury judgment, the Parichs and the Judices, through their attorneys, entered into a valid and effective compromise agreement in which the Judices granted the Parichs a "full release from further liability" in return for a $15,000.00 cash payment plus other non-monetary considerations.

As a result of the above, on January 26, 1987, a suit was filed in the Sixteenth Judicial District Court, Parish of Iberia, by the Parichs against State Farm alleging that State Farm was in bad faith for its failure to settle a claim made by the Judices against the Parichs and State Farm and that State Farm acted arbitrarily and capriciously and was in breach of their contractual duty owed to the Parichs. In the alternative, the Parichs alleged that State Farm was negligent in failing to settle the claim made by the Judices for payment of its policy limits plus judicial interest from the date of judicial demand until paid. On February 20, 1987, a Petition for Removal was filed in the United States District Court, Western District of Louisiana, Lafayette-Opelousas Division, by State Farm and, as a result, this case was subsequently removed to Federal Court pursuant to the provisions of 28 U.S.C.A. 1441. On April 11, 1989, the morning of trial, the trial judge allowed the Judices to intervene in the lawsuit filed by the Parichs on January 26, 1987 against State Farm.

Trial in the matter filed by the Parichs on

January 26, 1987 was held before the Honorable Donald E. Walter. After several days of testimony, and the presentation of evidence by all parties, the trial Judge found that State Farm, through its previous attorney Alex Lopresto, was negligent in its handling of a March 21, 1986 offer made by the Judices and its consequent failure to settle. Furthermore, the trial Judge found that there was not a valid out-of-court compromise reached between the Parichs and the Judices based upon their post-judgment actions regarding the original suit filed by the Judices in the Sixteenth Judicial District Court, Parish of Iberia, No. 52363, against the Parichs and State Farm. As a result of this ruling, State Farm perfected an appeal, seeking relief from the United States Court of Appeals.

A learned panel of the Fifth Circuit Court of Appeals, after considering all of the issues and Louisiana law, rendered a decision reversing the previous decision of the District Judge and remanded the case for judgment in accordance with its opinion. The learned panel agreed with the District Court's determination that State Farm was negligent in its handling of the March 21, 1986 offer made by the Judices and its consequent failure to settle. However, the U. S. Fifth Circuit Court of Appeals determined that the Judices and the Parichs had, in fact, entered into a valid and effective compromise agreement which resulted in the Judices granting the Parichs a "full release from further liability" in return for a $15,000.00 cash payment plus other non-monetary considerations. As a result, the learned panel of the Fifth Circuit found that the total amount of damages suffered by the Parichs on account of State Farm's negligent failure to settle the

case was the "excess" amount that they paid to the Judices for their release from the previous tort judgment. Having concluded that a valid compromise agreement existed between the Judices and the Parichs at the time of the suit against State Farm, the panel for the U. S. Fifth Circuit Court of Appeals concluded in accordance with Louisiana case law affirmed by the state's highest court that the Parichs were entitled to recover that amount of damages which they actually sustained as a result of the excess judgment. As a result of previous settlement negotiations and the Parichs' personal offer to initially pay $12,000.00 toward any settlement, the learned panel of the Fifth Circuit concluded that the amount of excess damages the Parichs suffered as a result of State Farm's negligence was $15,000.00 minus $12,000.00, or $3,000.00 (representing the full extent of damages the Parichs suffered).

REASONS FOR DENYING THE WRIT

1. Considering those factors enumerated under Rule 10 of the Rules of the Supreme Court of the United States, this action does not present a compelling reason for this Honorable Court to exercise its power of review on Writ of Certiorari.

2. The decision of the Fifth Circuit Court of Appeals in this action is in accordance with Louisiana case law affirmed by the state's highest court and Louisiana statutory law.

ARGUMENT

1. WAS THE FIFTH CIRCUIT COURT OF APPEALS DECISION, HOLDING A VALID AND EFFECTIVE COMPROMISE AGREEMENT WAS ENTERED INTO BETWEEN THE PARICHS AND THE JUDICES, THEREBY 'FIXING' THE TOTAL DAMAGES SUFFERED BY THE PARICHS ON ACCOUNT OF STATE FARM'S NEGLIGENT FAILURE TO SETTLE THE CASE, AND CONSEQUENTLY DEFINING THE UPPER LIMIT OF STATE FARM'S LIABILITY IN THE INSTANT LAWSUIT MANIFESTLY ERRONEOUS, SUCH THAT IT SHOULD BE DISTURBED ON APPEAL?

The Trial Court in this action placed the value of the

Parichs' rights against State Farm as the full amount of the excess judgment for which they had been cast, specifically based upon its finding that the Parichs and Judices had not entered into a valid out-of-court compromise on the previous personal injury judgment. However, the United States Fifth Circuit Court of Appeals, by its reversal of that decision, specifically found that the underlying premise upon which the district court based its opinion was in error. In fact, the United States Fifth Circuit Court of Appeals specifically held that the Parichs and the Judices did, in fact, enter into a valid and effective out-of-court compromise in which the Judices granted the Parichs a "full release from further liability" from the previous personal injury judgment in return for a $15,000.00 cash payment plus other non-monetary consideration. Based upon this valid and effective compromise agreement between the Judices and the Parichs, the Fifth Circuit panel concluded, in accordance with Louisiana statutory law and Louisiana case law affirmed by the state's highest court that the resulting value of the Parichs' rights against State Farm was "fixed" in the previous compromise agreement and was that amount of money that actually paid to the Judices in consideration for their "full release from further liability". Petitioners' Writ is premised upon a crucial misinterpretation of the decision of the United States Court of Appeals in this action and, as a result, the argument presented by Petitioner is without merit.

More specifically, Petitioner's argument focuses upon Louisiana statutory and case law which addresses the situation involving the transfer of litigious rights by assignment. Petitioners incorrectly maintain, at page 10

of their Writ of Certiorari to this Honorable Court, that "the Fifth Circuit Court of Appeals found that the Parichs had validly assigned their rights to pursue State Farm to the Judices". However, a review of the Fifth Circuit Court of Appeals decision in this action, at page 25 of its written opinion (page App. 27 as setforth in the Appendix of Petitioners' Petition) clearly indicates that the panel of the Fifth Circuit concluded the assignment of litigious rights between the Parichs and the Judices was legally defective and could not have been a valid assignment of a litigious right.

As a result, State Farm respectfully directs this Court's attention to that particular area of Louisiana law involved in the instant action, namely, the jurisprudence which has addressed the value of a claim for bad faith and/or negligent refusal to settle a lawsuit by an insured who has previously compromised his own excess liability exposure for some amount less than the total amount of the excess judgment.

Initially, it should be noted that there is an absence of a compelling reason in this action for this Honorable Court to exercise its power of review on Writ of Certiorari. Although Rule 10 of the Rules of the Supreme Court of the United States provides an illustrative list of the character of reasons that will be considered when determining if a review on Writ of Certiorari is justified, application of those considerations to this action reveal that such a review is not warranted. The opinion of the U. S. Fifth Circuit Court of Appeals is in accordance with Louisiana statutory and case law and provides a correct determination in this action,

thereby, obviating the need for this Honorable Court to exercise its power of review on Writ of Certiorari.

A. THE JURISPRUDENCE INTERPRETING THE VALUE OF AN INSURER'S NEGLIGENT REFUSAL TO SETTLE CLAIM BY AN INSURED WHO HAS PREVIOUSLY COMPROMISED HIS OWN EXCESS LIABILITY EXPOSURE.

It is important to note that both the District Court and the U. S. Fifth Circuit Court of Appeals in this action both agreed that the proported assignment of litigious rights between the Parichs and the Judices was legally defective and did not constitute a valid assignment of a litigious right. This particular fact gains its significance due to the fact that Petitioners' argument is based solely upon the incorrect conclusion that the Fifth Circuit Court of Appeals found that the Parichs had validly assigned their rights to pursue State Farm to the Judices. As a result, the Louisiana case law and statutory law cited by Petitioners' in their Writ of Certiorari to this Honorable Court is inapplicable to those issues raised in this action, as this action does not involve a valid assignment of litigious rights.

More specifically, the case of Great Southwest Fire Insurance Company v. CNA Insurance Companies, et al, 547 So.2d 1339 (La. App. 3rd Cir. 1989), affirmed 557 So.2d 966 (La. 1990), cited and relied heavily upon by Petitioners' does not, in fact, address the issue of the value of the rights of an insured against an insurer for its alleged bad faith and/or negligent failure to settle, at

all. Rather, Great Southwest Fire Insurance Company, supra, involved an action by an excess liability insurer against a primary liability insurer for damages actually suffered by the excess insurer as a result of the primary insurer's alleged bad faith failure to properly defend and/or settle a liability claim on behalf of mutual insured. The only issue presented before the Court of Appeals in Southwest was whether or not an excess insurer had a right or cause of action for damages against a primary insurer for the latter's bad faith failure to properly defend and/or settle a liability claim on behalf of their mutual insured. The specific issue regarding the value of that right or cause of action, if it was found to exist, was not specifically before the Court in Southwest.

Additionally, the rationale utilized by the courts in Southwest, is inapplicable to this action for a number of other reasons. One, Southwest involved a situation in which a third party (the excess insurer, Southwest), paid an obligation on behalf of its insured and, as a result, became legally and conventionally subrogated to the insured's claim against the primary liability insurer to the extent of its payment. Conversely, this action does not involve issues of legal and/or conventional subrogation, nor does it involve the payment of an obligation by a third party on behalf of the insureds, the Parichs. Secondly, unlike this action, the courts in Southwest, were not faced with a situation involving a valid and effective out-of-court compromise between the insured and his judgment creditor executed prior to the filing of the excess suit and in no way addressed those issues regarding the value of the insured's claim for the

excess judgment as effected by the previous compromise. Finally, the court's discussion in Southwest regarding the "collateral source" rule is inapplicable in this action, an action which does not involve the payment of an obligation by a third party on behalf of another.

Furthermore, the case of Hodge v. American Fidelity Fire Insurance Company, 486 So.2d 233 (La. App. 3rd Cir. 1986), writ denied, 489 So.2d 917 (La. 1986), cited by Petitioners, the Judices, does not conflict with the decision of the United States Fifth Court of Appeals in this action. In fact, Hodge, like Southwest, does not address those issues which are involved in the instant action, rather, the Louisiana Third Circuit Court of Appeals in Hodges only addressed the following issues:

(1) Can an insurer be held to be arbitrary and capricious and liable to its insured for an excess judgment if, prior to trial, it rejects an offer to settle for policy limits plus judicial interest and costs of court?

(2) If so, did Defendant (AFFIC), under the particular circumstances of that case, act arbitrarily and capriciously?

The facts surrounding the Hodge case did not involve a compromise agreement between the insured and the judgment creditor prior to the insured filing the excess suit against his own insurer, and therefore, the Third Circuit in Hodges did not consider, at all, what effect the existence of such a compromise would have on the ultimate value of the insured's right against his insurer

for the alleged bad faith failure to settle.

As a result, the insured, Hodges, (unlike the insureds in this action, the Parichs), sued his liability insurer, AFFIC, to recover the total amount of the excess judgment previously rendered against him over and above the limits of coverage provided for in the policy issued to the insured by AFFIC, i.e., $20,000.00. The Third Circuit Court of Appeals in Hodges, after finding that AFFIC was arbitrary and capricious, rendered judgment in favor of the insured and against AFFIC for the excess judgment previously rendered against him, together with costs, legal interest, penalties and attorney's fees. The crucial point to be recognized in the Hodge case which distinguishes it from this action is that the insured in Hodges was, at the time of bringing the excess suit against AFFIC, still liable and responsible for payment to its judgment creditor for the full amount of the excess judgment over and above AFFIC's liability limits.

Considering the specific factual circumstances surrounding this action, the opinion of the United States Fifth Circuit Court of Appeals is entirely correct and in accordance with Louisiana case law affirmed by the state's highest court and Louisiana statutory law. State Farm respectfully directs this Court's attention to the Louisiana Supreme Court case of Roberie v. Southern Farm Bureau Casualty Insurance Company, 250 La. 105, 194 So.2d 713 (1967), a case which is directly on point to those issues involved in the instant suit and which the panel of the Fifth Circuit in this action relied upon in rendering its decision as to the value of the Parichs' claim against State Farm. As a side note, it should be

mentioned that although Petitioner discusses the Roberie case and attempts to distinguish it from this action, the distinction is based upon the incorrect assumption that the Fifth Circuit Court of Appeals in this action found that the Parichs had validly assigned their rights to pursue State Farm to the Judices. Therefore, after considering the application of the holding of Roberie to this action, based upon the true holding of the Fifth Circuit Court of Appeals, it becomes quite clear that the two cases are virtually identical in nature.

The case of Roberie involved an action by an insured to recover from his automobile liability insurer an amount that the insured was forced to pay in satisfaction of the judgment rendered in excess of the maximum policy limits of his insurer. After being cast in judgment for $28,000.00 (and only having a liability policy of $20,000,00), the insured, Roberie, (like the Parichs in this action) compromised his $8,000.00 liability for $7,000.00, the basis of his lawsuit against his insurer, Southern Farm Bureau Casualty Insurance Company. From the Louisiana Supreme Court's opinion, it is clear that the insured is only entitled to recover that amount of damages which he sustained as a result of the excess judgment. As a result, Roberie was awarded the sum of $7,000.00, i.e. the extent of his damages actually suffered as a result of the excess judgment.

Carrying the above rationale contained in the Roberie case over to this action, it becomes quite clear that the decision of the U. S. Fifth Circuit Court of Appeals is entirely consistent with Louisiana case law affirmed by the state's highest court. Based upon the

valid and effective compromise executed between the Parichs and the Judices prior to the excess suit being filed against State Farm, the Fifth Circuit panel following the Louisiana Supreme Court's rationale in Roberie correctly concluded that the total damages suffered by the Parichs on account of State Farm's negligent failure to settle the case was the "excess" amount they paid to the Judices for their release from the judgment. Clearly, the case of Roberie, supra, and those cases cited along with Roberie by the Fifth Circuit (which cases support general principles initially espoused by the Louisiana Supreme Court in Roberie), were not relied upon as giving support to the position that the value of an assignment of litigious rights is limited to the amount of the insured judgment debtor actually paid the judgment creditor, as Petitioners would have this Honorable Court believe. Rather, the case of Roberie, supra, and its successors, were relied upon by the Fifth Circuit in valuing an insured's rights against an insurer in an "excess" suit where the insured has previously entered into a valid and effective compromise obtaining a release from any further liability for a fixed consideration.

Therefore, Petitioners' conclusion that the Fifth Circuit Court of Appeals' opinion in this case followed to its logical conclusion leads to the untenable situation where a judgment creditor must force the debtors into bankruptcy is based upon an incorrect interpretation of the Fifth Circuit's decision. The Fifth Circuit's decision does not address a situation involving a valid and effective assignment of litigious rights, but rather addresses the issue of what effect an out-of-court compromise between the judgment debtor and the

judgment creditor has on the resulting value of the insured's right against his insurer for a previous excess judgment based upon the insurer's bad faith and/or negligent failure to settle the case. Clearly, the Fifth Circuit's decision in this action, placed in its proper context, in no way forces a judgment creditor to pursue a judgment debtor into bankruptcy as the only option in collecting an outstanding judgment.

B. THE FIFTH CIRCUIT COURT OF APPEALS VALUATION OF RIGHTS IS NOT CONTRARY TO LOUISIANA CIVIL CODE ARTICLES ADDRESSING THE SALE OF LITIGIOUS RIGHTS AND THE JURISPRUDENCE INTERPRETING THOSE ARTICLES.

The panel of the Fifth Circuit of Appeals found that the Parichs and the Judices entered into a compromise agreement prior to the initiation of the district court proceedings. As a result of the compromise agreement, the Fifth Circuit Court of Appeals specifically held that the value of the Parichs' claim against State Farm for damages suffered on account of State Farm's negligent failure to settle the case, was the "excess" amount they paid to the Judices for their release from the previously rendered judgment. As a result, the Fifth Circuit Court of Appeals concluded that the amount of excess damages the Parichs suffered as a result of State Farm's negligence was $3,000.00, the difference between $12,000.00, the amount the Parichs offered to pay the Judices prior to the trial of the personal injury suit, and

after the jury verdict in the personal injury suit. Therefore, State Farm was found liable to the Parichs, and hence the Judices as Intervenors, for the excess damages in the amount of $3,000.00.

The Judices cite Louisiana Civil Code Articles 2652 and 2654(2) in support of their position that they (as Assignees of Litigious Rights) are entitled, not to the value the insured paid to the judgment creditor, and not the real price that the judgment creditor paid to the insured, but the actual value of the excess judgment. However, a review of the Fifth Circuit Court of Appeals decision in this action clearly reveals that the Civil Code Articles addressing the sale of litigious rights and the jurisprudence interpreting those Articles are not applicable to the specific facts surrounding this action. More specifically, as mentioned on numerous occasions previously in Respondent's Brief in Opposition to Petitioners' Writ of Certiorari, this case does not involve a valid assignment of litigious rights. In fact, the Fifth Circuit Court of Appeals relying upon Louisiana Civil Code Article 2653, specifically held that there did not exist a valid assignment of litigious rights in this action. Civil Code Article 2653 provides:

> "A right is said to be litigious, whenever there exists a suit and contestation on the same."

Therefore, based upon the Fifth Circuit Court of Appeals' decision, Petitioners' reliance upon Civil Code Articles 2652 and 2654(2) is misplaced and those Articles are inapplicable to those issues involved in this action.

Finally, the Fifth Circuit Court of Appeals correctly recognized that Louisiana law provides that the parties to a dispute may adjust their differences by mutual consent and enter into a compromise agreement. Louisiana Civil Code Article 3071 states:

> "A transaction or compromise is an agreement between two or more persons, who, for preventing or putting an end to a lawsuit, adjust their differences by mutual consent, in the manner which they agree on, and which everyone of them prefers to the hope of gaining, balanced by the danger of losing.
>
> This contract must be either reduced into writing or recited in open court and capable of being transcribed from the record of the proceeding. The agreement recited in open court confers upon each of them the right of judicially enforcing its performance, although its substance may thereafter be written in a more convenient form."

Based upon Louisiana Civil Code Article 3071, the Fifth Circuit Court of Appeals found that the Judices and the Parichs had entered into a valid and effective out-of-court compromise in which the Judices granted the Parichs a "full release from further liability" in return for a $15,000.00 cash payment plus other non-monetary consideration. This amount represented the Parichs

fixed the maximum limit of total damages which the Parichs would be required to suffer on account of State Farm's negligent failure to settle the case. It is based upon this premise that the Fifth Circuit Court of Appeals made a determination of State Farm's liability to the Parichs, and hence the Judices as Intervenors, for the excess damages.

CONCLUSION

The decision of the United States Fifth Circuit Court of Appeals was made in accordance with Louisiana case law affirmed by the state's highest court and Louisiana statutory law. The Fifth Circuit's ruling in this action clearly follows the rationale utilized by the Louisiana Supreme Court in the case of Roberie, supra.

Furthermore, the application of those Louisiana Civil Code Articles addressing the sale and/or assignment of litigious rights along with the jurisprudence interpreting those Articles is inapplicable to this action. Based upon both the District Court's and the United States Fifth Circuit Court of Appeals' decision that there did not exist a valid and effective assignment of litigious rights in this matter, the valuation of the Parichs' right against State Farm was based upon other principles of law not specifically addressed in Petitioners' Writ of Certiorari to this Honorable Court. As a result, Petitioners' discussion regarding the forcing of insureds into bankruptcy as a result of this decision is wholly without merit.

For the foregoing reasons, this Court should deny the Judices' Petition for Writ of Certiorari.

Respectfully submitted,

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